Supreme Court, U.S.
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No. 95-2054

In The

Supreme Court of the United States

October Term, 1995

ROBERT GUSTAFSON,

Petitioner,

v.

CITY OF LAKE ANGELUS; DONALD ALTHOFF, Mayor of the City of Lake Angelus; MICHAEL STEFANI, Chief of Lake Angelus Police Force,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

I. REPLY TO RESPONDENT'S "STATEMENT OF THE CASE"

A. Failure To Establish Any Rational Relationship To The City's Stated Objectives.

Respondent suggests at page 2 and page 11 that the ordinances were "reaffirmed by resolution" in 1991, and that the intended purpose was to protect the health, safety and welfare of persons and property in the city. However, the 1946 ordinances permitted operation of waterborne aircraft, and the *prohibition* ordinances were not enacted until the early 1970's (Petition App. 7, at page 82). Discovery in this case has shown that the ordinances were established on an *arbitrary, whimsical and capricious, discriminatory* nuisance basis, while permitting much more powerful and noisier water ski boats, etc., to operate on the lake for hours at a time. (Petition App. 5, at 68, 69). Noise, safety and environmental concerns where never taken into account, as testified to by the Mayor and the Chief of Police. (Petition App. 5, at 68, 69). Indeed, the City only passed its resolution stating that "health, safety and welfare of its citizens" was a factor in the seaplane prohibition subsequent to the decision of *Square Lake Hills v. Bloomfield Township,* 437 Mich. 310, 471 N.W.2d 321 (1991), after that case came down utilizing the "health, safety and welfare" language. That case has absolutely nothing to do with aviation, seaplanes, or federal preemption.

B. Regulation v. Total Prohibition.

Further, the *Square Lake case was premised upon regulation of the number of boats permitted on a small lake, not the total prohibition of any type of boats or aircraft.* In this case, the city ordinances prohibiting the operation of aircraft over and upon the surface of the lake is exclusionary. An ordinance which *totally excludes* an otherwise legitimate use carries with it a strong taint of unlawful discrimination and a denial of equal protection of the law as to the excluded use. *English v.*

Augusta Township, 204 Mich. App. 33, 514 N.W.2d 172 (1994) (Docket No. 141480, decided March 7, 1994) (See Petition at pages 25, 26).

An appropriate analysis must consider the nature of the significant Constitutional limitations upon local power to strip individuals and the public of their due process and equal protection rights, and the utter failure of the City in this case to support its conclusory allegations that the Ordinances were reasonably related to the achievement of the City's stated objectives, in light of substantial evidence to the contrary.

C. Respondents Have Admitted That The Ordinances Are Based On Aircraft Noise And Danger, Areas Clearly Reserved To The FAA.

At Page 11 of their Brief in Opposition, Respondents state *"Aside from noise regulation, which may be preempted,* the stated public purposes are all rational and reasonable." (Emphasis added) This is a clear admission that this Honorable Court has held that concerns regarding Aircraft Noise and Safety of both persons in the air and on the ground must be expressly reserved to the FAA, to preserve the delicate and uniform balance between convenience, safety, and the nation's need for a useful national airspace and airport system. *City of Burbank v. Lockheed Air Terminal,* 411 U.S. 624 (1973) (See Petition at Pages 18, 19). The City of Lake Angelus Resolution, which was concocted some 20 years *after* the ordinances went into effect for purely emotional and prejudicial reasons, attempts to justify the *prohibitions* based upon noise, danger (safety), and pollution. The FAA is not required to exercise its full power in order to occupy the field, and a local ordinance predicated in part upon noise reduction must fail. *San Diego Unified Port Authority v. Gianturco,* 651 F.2d 1306 (9th Cir. 1981). Finally, Respondent argues that the potential of Zebra Mussel infestation is a basis for the prohibition. In The Affidavit of expert witness John Schwartz, dated October 18, 1993, and made part of the record below, Mr. Schwartz states his opinion that seaplanes are no more likely to introduce mussels into the lake than are boats. (Reply App. 1) There are no enforcible ordinances requiring boat owners to inspect for

Zebra Mussels at Lake Angelus. Further, Mayor Donald Althoff has testified that no study had ever been conducted to determine whether there were already Zebra Mussels in Lake Angelus, and admitted that there may be some in the lake right now. (Reply App. 2).

II. PETITIONER HAS ACCURATELY STATED THE FACTS AND LAW

A. Petitioner's Statement Of Question II.

The Respondent has stated at page 4 that Question II as framed in the Petition is inaccurate and argumentative. In fact, the Petition contains an entire section which clearly presents record facts and law in full support of the issues presented by Question II, commencing on page 25 of the Petition. It is certainly Petitioner's position that the Circuit Court below erred in its findings in this regard, and that is without question a proper basis upon which to Petition was Honorable Court for Certiorari.

B. The Ordinance Provisions Which Prohibited Flight At Altitudes Below 500 Feet Are Currently At Issue.

Respondent states at page 5 that there is no altitude issue remaining in this case. However, as clearly set forth in the Petition at the time that Petitioner Robert Gustafson filed this action in the District Court below, the city ordinance contained not only a *prohibition* against landing on the surface of the lake, but also a clearly (and subsequently admittedly) *Federally Preempted prohibition against any* aircraft fiying within 500 feet of the surface of Lake Angelus, notwithstanding the fact that the lake underlies the Airport Traffic Area and Control Zone of the FAA Air Traffic Control Tower located at Michigan's second busiest airport. (Petition, page 7). The District Court, the Circuit Court, and the Respondent have now all agreed that the 500 foot prohibition *clearly* is Federally Preempted. Even the passage from the District Court's opinion, cited by Respondent clearly quotes the Court

as stating that "Defendants *seem willing* to give up the altitude restriction, but not the landing portion." At oral argument before the District Court, the City Attorney conceded that there *may* be some problems with the City's theory in defense of the airspace prohibition in light of the Federal Preemption authority cited by Petitioner Robert Gustafson, but argued that the PROHIBITION of seaplanes on the surface should still prevail.

However, the City *never* withdrew its brief in support of the Airspace *Prohibition* or withdrew its position regarding its validity until *SUBSEQUENT* to the issuance of the District Court's opinion and permanent injunction prohibiting the City from enforcing the ordinances against seaplane pilots. Instead, the City simply chose not to include in their appeal to the Sixth Circuit Court of Appeals that portion of the District Court's injunction striking down the altitude *Prohibition.*

Therefore, in the Courts below, Petitioner Robert Gustafson requested Attorney Fees and Costs, since his action was the "catalyst" which caused the defendant City to make significant changes in its past practices, therefore entitling Petitioner to his costs even if no direct relief is obtained. *Americans United for Separation of Church and State v. School District of the City of Grand Rapids,* 835 F.2d 627 (6th Cir. 1983).

The Circuit Court below appears to have misunderstood the fact that the defendant City *did not* voluntarily give up the offending altitude *Prohibition* until after they had lost in the District Court on that issue. (App. 1 footnote 2). Therefore, the altitude restriction is very much at issue in this matter, as Petitioner has pursued his entitlement to his substantial costs and attorney fees.

C. Petitioner Has Not Filed A New Amicus Brief With The Petition.

Petitioner has appended no Briefs of any kind to the Petition which were not fully before the Circuit Court of Appeals below. Indeed, one very relevant and highly significant document which directly contradicts the position of

Respondent was provided to the Circuit Court solely as an exhibit to the Amicus Brief of the Seaplane Pilots Association.

The City of Lake Angelus argued in the courts below and at pages 19 and 20 of their Brief in Opposition that "the FAA itself has recognized that landings may be prohibited by local ordinance, since it has noted the Lake Angelus prohibition in its official publication." (the United States Government Flight Information Publication, Airport/Facility Directory).

D. FAA Position Statements

In direct rebuttal to the allegations by the City regarding the position of the Federal Aviation Administration (FAA) in this case, the *FAA submitted an affidavit specifically stating that their inclusion of the ordinance was not intended as a statement that the ordinance was valid or enforceable.* (Pet. App. 6 at 80, 81) The sole reason that the FAA identified the ordinance to the pilot community was to prevent pilots from being "blindsided" with arrest and prosecution from a surprise, unknown ordinance.

This is extremely relevant information upon review by this Honorable Court. The *FAA has provided both this affidavit and an additional letter* dated November 17, 1994, to the Oregon Office of Legislative Counsel, expressly stating the Agency's position, that a *state may not draft legislation governing seaplane* operations since *uniform regulations governing seaplane operations* throughout the United States are codified at 14 C.F.R. Part 91, section 91.115 of which specifically applies to seaplanes (Pet. at 8, 9, Pet. App. 6).

Contrary to the above Statements of the FAA, the Circuit Court below erroneously determined that the FAA position is completely opposite to the Statements of the FAA on the Record. (Compare Pet. App. 1 at pages 16 through 18 with Pet. App. 6, at pages 77 through 81). *Petitioner renews his suggestion that this Honorable Court Request the FAA to Provide Its True Opinion regarding Seaplane Federal Preemption.*

III. STATE AND LOCAL ORDINANCES WHICH PURPORT TO PROHIBIT AIRCRAFT OPERATIONS ABOVE OR UPON OPEN WATER ARE PREEMPTED BY FEDERAL LAW.

A. The District Court Below Found That Regulations Enacted Pursuant To The Federal Aviation Act, 49 U.S.C. App. Sections 1301-1557, And The Federal Aviation Regulations (FARs) Promulgated Thereunder, Imply That Congress Intended That This Area Be Preempted. (Petition App. 2, At Page 43).

The District Court's conclusion is supported by the express language of the Act and the FARs promulgated thereunder. 49 U.S.C. App. 1508(a) provides that:

> *The United States of America is hereby declared to possess and exercise complete and exclusive national sovereignty in the air space above the United States, including the air space above all inland waters.* (Emphasis added).

Section 40103(B)(2) of the Act delegates to the FAA the authority to:

> (D.) prevent[ing] collision between aircraft, between aircraft and *WATER VEHICLES*, and between aircraft and airborne objects. (Emphasis added)

Section 40103(b)(1) of the Act states that:

> (a) The Administrator of the Federal Aviation Authority shall develop plans and policy for the use of the *NAVIGABLE AIRSPACE* . . . (Emphasis added)

"*NAVIGABLE AIRSPACE*" is defined as "airspace above the *MINIMUM ALTITUDES* of flight prescribed" by FARs, *and includes the airspace needed to insure safety in take-off and landing of aircraft.* 49 U.S.C. 1301 (29). Pursuant to 49 C.F.R. section 119, there is *NO MINIMUM ALTITUDE OVER OPEN WATER*, which is a major difference and distinction in the way the Federal Aviation Regulations treat land versus open bodies of water. 14 C.F.R. 91.119 provides an express exception to minimum altitudes when aircraft are operated over open water:

> Minimum safe altitudes: General
>
> *Except when necessary for takeoff or landing,* no person shall operate an aircraft below the following altitudes:

. . .

(c) Over other than congested areas. An altitude of 500 feet above the surface, *except over open water* or sparsely populated areas. *In those cases, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle or structure.* (Emphasis added).

Section 91.115 specifically regulates the operation of aircraft on the surface of the water. 14 C.F.R. 91.115. (See Petition App. 2, at page 46)

These FARs do not state that the activity is subject to local constraint. As the District Court summarized:

> The FAA provides safety regulations for take-offs, landings, and operations on water, as well as allowable altitudes. The purpose of the City ordinance, taken as a whole, is to prohibit seaplane operations of any kind on the lake or up to 500 feet above the city. This is clearly contrary to the FAA regulations and federal statutes, and thus, the ordinances are preempted. (Petition App. 2, at page 47)

In support of its conclusion, the District Court observed that subsequent courts have followed the Supreme Court's guidance in *City of Burbank* to find federal preemption in a variety of local ordinances, including those which purport to restrict or prohibit use of navigable airspace under the guise of noise abatement measures. (Petition App. 2 at pages 44 and 45).

B. The District Court Properly Found That LOCAL LAND USE REGULATIONS Are NOT Involved In This Case.

Respondent argues at pages 14 through 18 of the Brief in Opposition that the Federal Aviation Act was not intended to preempt local land use planning.

Respondent cites at page 17 the case of *Faux-Burhans v. County Comm'rs,* 674 F. Supp. 1172 (D. Md. 1987), aff'd without opinion, 859 F.2d 149 (4th Cir. 1988), cert. denied, 488 U.S. 1042, 109 S. Ct. 869, 102 L. Ed. 2d 992 (1989), for the proposition that no federal law gives a citizen the right to operate an airport free of local zoning control. The Circuit Court analogized to this case.

However, the District Court *expressly distinguished* the *Faux-Burhans* case from the instant case:

> Defendants also cite Blue Sky and Faux-Burhans v. County Comm'rs . . . As already noted, however, the court in Blue Sky invalidated several local ordinances because they were preempted by FAA regulations. *Faux-Burhans is also inapplicable because that case involved land use regulations governing the development of land in the construction of an airport. It did not involve ordinances that directly regulated aircraft flight operations as this case does.* (Emphasis added).
>
> (Petition App. 2, at page 47)

The line of cases cited by Respondent simply has no bearing, especially in a case where the lake is already being used for recreational boating, waterskiing, and other similar uses which are noisier and of longer duration than the 85 horsepower Piper Cub Seaplane at issue. *See, e.g.,* Inland Lake and Streams Act, Mich. Comp. Laws Ann. 281.951, *et seq.;* Mich Comp. Laws Ann. 281.1114 (noise levels of 90 decibels or less are acceptable). Compare, *United States v. County of Westchester,* 571 F. Supp. 786 (S.D.N.Y. 1983) (90% of general aviation fleet has a noise level of 76 decibels or less).

Under this factual scenario, there is simply no local zoning plan for land use which would be affected by the occasional operation of a seaplane.

C. Respondent Has Admitted That 14 C.F.R. Part 157 Is Unrelated To The Issues In This Case.

The Circuit Court below stated:

> We believe it is appropriate to find that the landing of a seaplane on a lake, not officially designated as a landing area, is tantamount to, and can be reasonably construed as, the creation of an airport. Under FAA regulations, the broad definition of airport includes seaplane bases. 14 C.F.R. 157.2 (Petition App. 1, at page 19)

The Circuit Court believed it would be necessary for part 157 airport requirements to be complied with, and that was a basis for its finding of no Federal Preemption.

Respondent correctly points out at page 19 of the Brief in Opposition that *14 C.F.R. Part 157 HAS NO APPLICATION TO, AND SPECIFICALLY EXEMPTS, THE VERY TYPE OF "LANDING AREA" CREATED BY A SEAPLANE'S PRESENCE.* (See Petition App. 10) *The practical result is a conflict between a local ordinance and the FARs at the moment the seaplane touches the water.*

D. The Circuit Court Concluded That The FAA Has Sole Control Of Aircraft Operations Once The Airport Has Been Established.

The Circuit Court states:

> " . . . once an airport is operating, it may be that only the FAA can regulate the resulting noise problem . . . " (Petition App. 1, at page 29)

The Court also cites the case of *Price v. Charter Township of Fenton,* 1995 WL 738386 (E.D. Mich. Nov. 30, 1995) for the proposition that once a landing area is operating, the FAA preempts local ordinances. *HOWEVER, THE CIRCUIT COURT FAILS TO ADDRESS THE PREEXISTING USE OF LAKE ANGELUS BY SEAPLANES REFLECTED IN THE RECORD.* (Petition App. 7, at Page 82).

IV. STATE AVIATION ISSUES

A. Seaplane Cases Cited By Respondent.

Respondent cites a number of cases regarding seaplane prohibitions at pages 21 and 22 of the Brief in Response. The Case of *Christianson v. Hauptman,* 991 F.2d 59 (2nd Cir. 1993) has no relevance since it relates only to regulations of a Federal Agency, The National Park Service. It has nothing to do with state or local regulation.

Georgia Power Company v. Baker, 830 F.2d 163 (11th Cir. 1987) was a case which involved private property, had nothing to do with any Federal Preemption issues, and in which a seaplane commercial flight school was at issue, unlike the instant case.

The District Court below did not find persuasive *City of Shreveport v. Conrad,* 212 La. 737, 33 So. 2d 503 (1947), nor

People v. Altman, 304 N.Y.S. 2d 534 (N.Y. Sup. Ct. 1969). *City of Shreveport* is an early state court case in which a municipal ordinance prohibiting seaplane landings was upheld. As the District Court pointed out, *City of Shreveport* did not even address the preemption issue, was decided before *City of Burbank*, and before the Federal Aviation Act became law. Similarly, *Altman* was properly distinguished by the District Court on the grounds that the local ordinance was in harmony with the federal statute, was decided before *City of Burbank*, and the court did not address the FAA regulations at issue in this case.

Neither of the other two state court cases cited by Respondent have anything to do with Federal Preemption issues, and are apparently cited solely because a seaplane was factually involved.

B. The State Of Michigan Has Taken The Position That *No* Seaplane Prohibition Should Exist At Lake Angelus.

The sole objective analysis undertaken at the City of Lake Angelus' request was a review of the lake by James Greshel, Administrator, Safety & Services Division of the Michigan Bureau of Aeronautics. The City had requested that the State Bureau of Aeronautics itself prohibit seaplane operations on Lake Angelus. Mr. Greshel refused to prohibit seaplanes, and saw no factor which would prevent aircraft safely taking off or landing on Lake Angelus. He stated *"[T]here is no significant aviation safety or airspace basis to exclude seaplanes from Lake Angelus."* (Petition App. 9, at pages 88, 89).

V. CONCLUSION

For all of the reasons stated, Petitioner, Robert Gustafson, prays that this Honorable Court grant a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

STEVEN M. CHAIT & ASSOCIATES, P.C.
STEVEN M. CHAIT

APPENDIX I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT GUSTAFSON, Lake Angelus Riparian Property Owner,

Plaintiff,

-vs-

CITY OF LAKE ANGELUS, DONALD ALTHOFF, MAYOR OF THE CITY OF LAKE ANGELUS, MICHAEL STEFANI, CHIEF OF LAKE ANGELUS POLICE FORCE,

Defendants.

Case No:
92 CV 73976 DT
Hon. Paul V. Gadola

(Filed Dec. 27, 1993)

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SUPPLEMENTAL AFFIDAVIT OF JOHN SCHWARTZ

State of Michigan)
) SS
County of Oakland)

JOHN SCHWARTZ, being first duly sworn, deposes and states the following:

1. I work at Michigan State University as Program Leader for the Sea Grant College Program, which is a program that does research on the Great Lakes, and further provides extension outreach assistance to local communities.

2. That in my opinion, seaplane operators who utilize the same type of inspection and cleaning procedures on their seaplanes as are recommended for use on boats, would not be any more likely to introduce Zebra Mussels into Lake Angelus, than the presently permitted watercraft.

3. That in my opinion, the operator of a seaplane can perform the same type of preventative Zebra Mussel inspections and cleaning as the operator of the currently permitted watercraft on Lake Angelus, by landing their amphibious seaplanes at an airport to perform those inspections and cleaning prior to landing on Lake Angelus, or by simply restricting takeoffs and landings in non-amphibious seaplanes to Lake Angelus.

4. That in my opinion, I concur with the Michigan Department of Natural Resources that inevitably, all Michigan inland lakes are likely to become infested with Zebra Mussels, although this period of time may be decades.

5. I make this Affidavit on personal knowledge, and if sworn as a witness, I can testify competently to the facts stated herein.

Further deponent saith not.

/s/ John Schwartz
JOHN SCHWARTZ

Subscribed and sworn to before me
this 18th day of October , 1993.

/s/ Regina S. Bush
NOTARY PUBLIC

Ingram County, Michigan
My commission expires: Jan. 27, 1996

REGINA S. BUSH
Notary Public, Clinton County, MI
Acting in Ingham County, Michigan
My Comm. Expires Jan. 27, 1996

APPENDIX II

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT GUSTAFSON, LAKE ANGELUS RIPARIAN PROPERTY OWNER,

Plaintiff,

No. 92-CV-73976-DT
(Filed Dec. 27, 1993)

vs

CITY OF LAKE ANGELUS; DONALD ALTHOFF, Mayor OF THE CITY OF LAKE ANGELUS; MICHAEL STEFANI, CHIEF OF LAKE ANGELUS POLICE FORCE,

Defendants.
_____/

The Deposition of DONALD ALTHOFF taken before Harvey A. Kahn, Court Reporter and Notary Public, in and for the County of Oakland, State of Michigan, at 25800 Northwestern Highway, Southfield, Michigan, on Monday, July 19, 1993, at about 10:15 a.m.

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Appearing on behalf of Defendants

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* * *

[p. 24] specifically relating to zebra mussels?

A No, to the best of my knowledge, no.

Q Have any studies been done by the City of Lake Angelus to determine whether zebra mussels exist in the lake?

A Specific as to that exposure, no.

Q Do you have any evidence, as we sit here today, that anyone has ever observed any zebra mussels in Lake Angelus?

A No specific knowledge.

Q Do you have any specific knowledge as to whether anyone has expressed an opinion whether there are or are not zebra mussels currently in Lake Angelus?

A I have no knowledge of it, no.

Q So, there might be, there might not be?

A Correct.

Q What specific procedures, if any, does Lake Angelus utilize to prevent the introduction of zebra mussels from boats?

A We communicated to the residents that if their individual boats were taken to other lakes, that before they were brought back on to Lake Angelus, the boats would be closely inspected and thoroughly washed before they were put back into Lake Angelus. [p. 25] We have requested that lake residents limit or restrict relatives and nonresidents from bringing their boats on to Lake Angelus. It's basically been a program of education in requesting that the residents be very cautious in this area.

Q So, these are in the nature of requests and not enforceable ordinances, is that correct?

A That's my understanding of it, yes.

Q Does the Police Department, or anyone else from Lake Angelus, go out and inspect someone else's boat before they reinsert it in the lake?

A For zebra mussels?

Q Yes.

A No.

Q Is that request restricting relatives and nonresidents from bringing their boats, is that just a request, or is that an enforceable ordinance?

A I wouldn't want to give a legal opinion on it. There is some wording in an ordinance, but I can't speak to the specific wording of the ordinance.

Q If a resident does have a relative that comes over with a boat and the resident launches it from that resident's property, is there anything currently that would be done by the City to stop that practice, or

* * *